

To: Anderson, RobinM[Anderson.RobinM@epa.gov]; Fitz-James, Schatzi[Fitz-James.Schatzi@epa.gov]
From: Walker, Stuart[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6907CF9284BF4BD5831517C27ECE9C53-SWALKE02]
Sent: Tue 6/1/2021 9:19:51 PM (UTC)
Subject: RE: ORR -- Inside EPA

Interesting article. I wonder how many groups are going to send something in and cite the Biden EO.

From: Anderson, RobinM <Anderson.RobinM@epa.gov>
Sent: Tuesday, June 1, 2021 3:11 PM
To: Walker, Stuart <Walker.Stuart@epa.gov>; Fitz-James, Schatzi <Fitz-James.Schatzi@epa.gov>
Subject: ORR -- Inside EPA

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Environmentalists Urge Regan To Reverse Nuclear Waste Cleanup Precedent

June 1, 2021

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Environmentalists are urging EPA Administrator Michael Regan to review, reconsider and reverse a precedent-setting Trump-era decision that technology-based effluent limits for radionuclides are not enforceable at a Superfund cleanup, charging such an approach is at odds with President Joe Biden’s environmental protection executive order (EO).

In [a May 26 letter](#), they charge that then-EPA Administrator Andrew Wheeler’s controversial decision at the Oak Ridge Reservation (ORR) is inconsistent with Biden’s EO 13990, which urges agencies to review Trump-era actions that may fail to meet the current administration’s public health and environmental goals. They also ask Regan to allow the public to comment on the decision -- before any Record of Decision (ROD) is signed -- to ensure EPA and the Department of Energy (DOE), which is responsible for the cleanup at the Tennessee site, adequately considered adverse impacts on a local minority community and whether the agencies adequately accounted for any climate change impacts.

“The Radionuclide Pollution Decision is inconsistent with the Administration’s goals stated in Executive Order 13990 and should be reviewed and reconsidered in order to ensure access to clean water and reduced exposure to dangerous radionuclide pollution in the communities surrounding the ORR site,” the Southern Environmental Law Center, Advocates for the Oak Ridge Reservation, Tennessee Chapter Sierra Club and Tennessee Citizens for Wilderness Planning say in their letter to Regan.

“This reconsideration is also essential to adequately evaluate (1) environmental justice impacts to the nearby Scarboro neighborhood, which was designated as a segregated community during World War II and has borne disproportionate environmental burdens associated with the ORR site; and (2) the impacts of climate change-related increasing intensity of storm events on the amount of radionuclide-containing wastewater entering Bear Creek.”

While the administration is reviewing numerous Trump-era rules under the order, non-regulatory decisions such as Wheeler’s also would fall under the broad coverage of EO 13990, one environmentalist says.

This source believes the order does not limit reviews just to rulemakings, citing EPA’s recent [revocation of a refinery air permit](#) in St. Croix.

While environmentalists would likely try to “cabin” the use of Wheeler’s precedent-setting decision at other sites, the environmentalist says, there is concern that if the decision is allowed to stand, it could result in “cut[ting] corners” on important cleanups. The source points to the possibility that liable parties may attempt to use his decision to evade technology-based solutions for Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) sites.

At issue is [Wheeler’s Dec. 31 decision](#) that resolved a lengthy dispute between EPA Region 4 and Tennessee regulators, on one side, and DOE on the other, over the cleanup at ORR.

While Wheeler backed Region 4 and the state on their position that water quality-based standards should apply as cleanup standards for a landfill discharging wastewater containing radionuclides, he set a precedent in rejecting Region 4 Administrator Mary Walker’s position that strict, technology-based effluent limitations should apply as enforceable applicable or relevant and appropriate requirements (ARARs).

Such site-specific requirements determine which state and federal requirements are enforceable at remedial actions governed by CERCLA.

'Most Troublesome'

The dispute with DOE had originally centered on whether EPA could invoke its CERCLA authority to apply strict Clean Water Act (CWA) requirements as ARARs to govern wastewater discharges.

Wheeler rejected DOE's argument that CWA regulations were not "relevant and appropriate" even if they were not "applicable" to Atomic Energy Act materials, and agreed with the region that water quality-based effluent limits and state water quality rules setting designated uses and criteria to protect uses "are relevant and appropriate requirements."

But Wheeler set the precedent when he reversed Region 4 on its determination that technology-based effluent limits apply, saying they "are not appropriate requirements to apply to a discharge of radionuclides from this CERCLA site." For instance, he rejected applying the state's antidegradation policy to radionuclide discharges from the sites' landfills.

The environmental groups say several of Wheeler's rulings in his Dec. 31 decision for ORR are concerning, but cite as "most troublesome" his decision "that EPA's Region 4 Acting Regional Administrator erred in determining that technology-based effluent limitations under the [CWA's] National Pollutant Discharge Elimination System (NPDES) regulations were relevant and appropriately applied to discharges of radionuclides from the ORR site." They note that Wheeler reached a contrary conclusion to Region 4, basing that on his analysis of factors 1, 3 and 5 listed under the National Contingency Plan, which is used to identify ARARs that apply to CERCLA releases.

They say Wheeler's "incomplete review misconstrued several ARAR factors," and argue EPA should clarify their application during a review.

"We believe that with these clarifications, technology-based effluent limitations are relevant and appropriate to the discharge of radionuclide-containing wastewater at the ORR site," they say in the letter.

For instance, the groups dispute Wheeler's determination that CERCLA's goal does not align with CWA technology limits because the latter aims to eliminate the discharge of all pollutants while CERCLA's does not. "Wheeler thus seems to argue that, because CERCLA does not specifically seek to completely *eliminate* exposure to and risks from hazardous substances, its purpose cannot be the same as the CWA's. This conclusion is contrary to the plain language of the statutes and seeks to create differences in the face of their overarching shared goals," they say.

They contend CERCLA remedial provisions aim to protect public health and the environment and identify "that an avenue to do so is by preventing -- i.e. eliminating -- or minimizing the release of hazardous substances." They say section 121 of CERCLA "expressly states a preference for technology-based standards."

They also say the decision should be revisited to evaluate potential implications for environmental justice and climate change, ask for discussions on other aspects of Wheeler's decision and that more public comment opportunities be made available due to new information related to relevant and appropriate requirements.

The environmentalist says Wheeler's letter to DOE settling the dispute was "craftily" written, saying EPA does set the standard, rather than DOE, but then eviscerating the region's decision on the technology limits and finding the state's antidegradation standard does not apply. As a general matter, technology-based standards are less flexible than water quality-based standards though any precedent is likely limited to sites with radionuclide contamination.

Betsy Southerland, a former EPA water and Superfund official, said at the time that Wheeler's letter would set precedent unless the Biden EPA develops a rationale for why technology-based standards should apply, noting that CERCLA requirements are unclear about the application of technology-based standards. "Given this ambiguity Wheeler was able to write that they don't apply," she said.

A spokeswoman with the Tennessee Department of Environment and Conservation, which was a party to the dispute with DOE, says the department is evaluating the groups' letter.

EPA has not yet responded to the groups' requests to hold discussions on the matter, according to the environmentalist.

An EPA spokesperson did not reply by press time to questions about the letter. -- *Suzanne Yohannan* (syohannan@)